TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 105

LENG MAY MA, PETITIONER,

vs.

BRUCE G. BARBER, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, SAN FRANCISCO DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 17, 1957

CERTIORARI GRANTED JUNE 3, 1957

No. 14252

United States
Court of Appeals
for the Ninth Circuit

LENG MAY MA,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—8-24-56

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Attorneys, Names and Addresses of	1
Bond for Costs on Appeal	9
Certificate of Clerk to Record on Appeal	11
Notice of Appeal	8
Order Denying Petition	8
Petition for Writ of Habeas Corpus	3
Ex. A—Letter Dated January 21, 1954	7

	Original	Print
Proceedings in U.S.C.A. for the Ninth Circuit		
Minute entry of argument and submission (omitted in printing)	13	13
Minute entry of order directing filing of opinion and filing and recording of judgment	14	13
Opinion, Healy, J.	15	13
Judgment	17	15
Clerk's certificate (omitted in printing)	18	16
Order allowing certiorari	19	16

NAMES AND ADDRESSES OF ATTORNEYS

Z. B. JACKSON, ESQ.,
JOSEPH S. HERTOGS, ESQ.,
580 Washington St.,
San Francisco 11, Calif.,
Attorneys for Petitioner and Appellant.

LLOYD H. BURKE,
United States Attorney;
CHARLES ELMORE COLLETT,
Asst. U. S. Attorney,
P. O. Bldg.,
San Francisco, Calif.,
Attorney for Respondent and Appellee.

In the United States District Court in and for the Northern District of California, Southern Division

No. 33302

In the Matter of the

Application of LENG MAY MA for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable United States District Judge of the United States District Court in and for the Northern District of California, Southern Division

The Petition of Joseph S. Hertogs, on behalf of Leng May Ma respectfully shows:

I.

That the said Leng May Ma, the person in whose behalf this writ is applied for, is now detained and restrained of her liberty by the respondent, Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco District, and his officers and agents; that the said Leng May Ma is now confined in the Detention Facilities of the Immigration and Naturalization Service, 630 Sansome Street, City and County of San Francisco, State of California.

II.

That no one has filed, in behalf of the said Leng May Ma, a previous application for a writ of

Habeas Corpus in and about the matter set forth herein to any Court.

III.

That your petitioner has been advised by the San Francisco office of the Immigration and Naturalization Service that the said Leng May Ma is to be deported from the United States to Communist China and that such deportation will take effect unless this Court intervenes to prevent deportation at this time.

IV.

(a) That the said Leng May Ma is a native of China who claims to have acquired United States citizenship at the time of her birth pursuant to the provisions of Section 1993, Revised Statutes of the United States;

(b) That the said Leng May Ma was accorded a hearing by an officer of the Immigration and Naturalization Service upon the occasion of her arrival from China on May 4, 1951, at San Francisco, and on numerous dates subsequent to her arrival on May 4, 1951; that it was the decision of the Immigration and Naturalization Service that the said Leng May Ma had failed to establish her identity as a United States national;

(c) That in a letter from the Immigration Service dated on or about January 5, 1954, the said Leng May Ma was notified that she should surrender herself to the Officer in Charge of the Immigration and Naturalization Service on January 15, 1954, for deportation to China.

V.

(a) That in January of 1954, there was caused to be filed with the appropriate office of the Immigration and Naturalization Service, in accordance with the provisions of 8 C.F.R. 243.3(h) a petition praying for a stay of deportation of the said Leng May Ma on the ground that the said Leng May Ma would be subject to physical persecution and probable death at the hands of the existing government of the place where the said Leng May Ma is to be deported;

(b) That there is attached hereto and made a part hereof, and incorporated as if fully set forth herein, marked Exhibit A, a copy of a letter advising that the said Leng May Ma is not entitled to a stay of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act of 1952.

VI.

That your petitioner has been advised by an offical executive of the District Director of the Immigration and Naturalization Service at San Francisco that the said Leng May Ma will be deported in accordance with the instruction from the Central Office of that Service as soon as travel arrangements can be completed.

VII.

That the said detention and restraint of the said Leng May Ma are illegal, and their illegality consists in the following, among others, to wit:

(a) That the said Leng May Ma has been denied the right guaranteed to her by the "due process of law" clause of the Fifth Amendment to the Constitution of the United States;

(b) That the contemplated deportation is in conflict with and contrary to the law and expression of Congress not to deport a person to a country or territory under enemy domination and where such person would be subject to physical persecution;

(c) That the decision of the Immigration and Naturalization Service denying the petition filed in behalf of the said Leng May Ma for a stay of deportation pursuant to the provisions of 8 U.S.C.A. 1253(h) is an abuse of discretion;

(d) That the contemplated deportation would be unusual and inhumane punishment contrary to the laws of the United States.

Wherefore, your petitioner prays that a writ of Habeas Corpus issue releasing the said Leng May Ma from detention and custody of the respondent, Bruce G. Barber, as District Director of the San Francisco District, Immigration and Naturalization Service, and for other and further relief as the Court may deem just and proper in the circumstances.

/s/ JOSEPH S. HERTOGS.

Duly Verified.

EXHIBIT A

(Copy)

United States Department of Justice
Immigration and Naturalization Service
San Francisco, California

January 21, 1954.

T-1 497 257
and T-1 497 260

Jackson & Hertogs, Attorneys at Law,
580 Washington Street,
San Francisco 11, California.

Att: Z. B. Jackson.

Gentlemen:

Re: Lee Non Sung and
Leng May Ma.

Reference is made to your letter of January 18, 1954, asking for an early decision on the aliens' requests for withholding of deportation based on allegation of physical persecution should deportation to China be effected.

Since the aliens have been excluded from admission to the United States they are not eligible for the relief afforded by Section 243(h) of the Immigration and Nationality Act and no stay of deportation will be granted.

Yours very truly,

BRUCE G. BARBER,
District Director.

By T. E. FLENNIKEN,
Acting Chief, Detention, Deportation and Parole Section.

[Endorsed]: Filed January 26, 1954.

[Title of District Court and Cause.]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

It appearing that the petition for writ of habeas corpus filed herein does not state facts sufficient to warrant the writ (8 USC 1253h) it is,

Ordered that the petition for writ of habeas corpus be and the same is hereby denied.

Dated: January 28th, 1954.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed January 28, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given this 29th day of Jan. 1954, that Leng May Ma hereby appeals to the United

States Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 28th day of Jan. 1954, in favor of the respondent and against the said Leng May Ma, plaintiff.

JACKSON & HERTOGS,

By /s/ JOSEPH S. HERTOGS,
Attorneys for Plaintiff.

[Endorsed]: Filed January 29, 1954.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, the plaintiff has appealed to the United States Court of Appeals, for the Ninth Circuit from a decision of this court denying a writ of Habeas Corpus.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, Maryland Casualty Company, a corporation duly organized and existing under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, does undertake and promises on the part of the Plaintiff, to secure the payment of costs if the appeal is dismissed, or such costs as the Appellate Court may award not exceeding the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, to which amount it acknowledges itself bound.

It is expressly agreed by the Surety that in case of a breach of any condition hereof, the above-entitled Court may, upon notice to the Surety of not less than ten (10) days, proceed summarily in the above-entitled action in which this bond is given, to ascertain the amount which the Surety is bound to pay on account of such breach and render judgment therefor against the Surety and award execution therefor, all as provided by and in accordance with the intent and meaning of rule 34 of the Rule of Practice of the United States District Court in and for the Northern District of California.

In Witness Whereof, the corporate seal and name of the said Surety Company, is hereto affixed and attested at San Francisco, California, by its duly authorized officer, this 28th day of January, 1954.

[Seal] MARYLAND CASUALTY COMPANY,

By /s/ D. S. ARMSTRONG,
Attorney-in-Fact.

The premium on this bond is $10.00 per annum.

State of California,
City and County of San Francisco—ss.

On this 28th day of January, 1954, before me, A. McClintock, a Notary Public in and for the City and County of San Francisco, personally appeared

D. S. Armstrong, known to me to be the Attorney-in-Fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my Office in the City and County of San Francisco the day and year in this Certificate first above written.

[Seal] /s/ A. McCLINTOCK,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires January 12th, 1957.

[Endorsed]: Filed January 29, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Petition for Writ of Habeas Corpus.

Order Denying Petition for Writ of Habeas Corpus.

Notice of Appeal.

Cost Bond on Appeal.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of February, 1954.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14252. United States Court of Appeals for the Ninth Circuit. Leng May Ma, Appellant, vs. Bruce G. Barber, District Director, Immigration and Naturalization, Appellee. Transcript of Record. Appeal From the United States District Court for the Northern District of California, Southern Division.

Filed: February 24, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[fol. 13] Minute entry of argument and submission—January 24, 1957 (omitted in printing).

[fol. 14] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—February 5, 1957

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 15] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,252

LENG MAY MA, Appellant,

v.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco District, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

OPINION—February 5, 1957

Before: Healy, Bone, and Lemmon, Circuit Judges

HEALY, Circuit Judge

This is an appeal from the denial by the court below of a petition for the writ of habeas corpus seeking a stay of deportation.

Petitioner is a native of China. She claimed acquisition of United States citizenship at birth on the statutory ground that her father was a United States citizen. She arrived in this country in 1951, and was by the Immigration Service accorded hearings on her claim but failed to establish her identity as a United States national to the satisfaction of the Service. Thereupon she was ordered to surrender for deportation to China. She petitioned the Service for a stay on the ground that she would be subjected to physical persecution and probable death if she were to return to China, seeking this relief on the basis of § 243(h) of the Immigration and Nationality Act of 1952 (8 USCA § 1253(h)), reading as follows:

> "The Attorney General is authorized to withhold deportation of any alien within the United States to [fol. 16] any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

The Service notified petitioner that no stay of deportation could be granted her inasmuch as aliens excluded from the United States are not eligible for relief under the above statute. She then brought this proceeding in habeas corpus.

The question for decision is whether an alien seeking admission to the United States is "within the United States" after his application for such admission has been decided against him. This court has recently held the contrary, stating that the status of such "person released by the immigration authorities on bond is still that of a person without the United States seeking admission." *Jew Sing* v. *Barber*, 215 F. 2d 906, 907 (1954), cert. granted 348 U. S. 910, judgment vacated for mootness 350 U. S. 898 (1955).

Some doubt is cast on our holding in *Jew Sing* because of the granting by the Supreme Court of certiorari therein, notwithstanding the subsequent vacation for mootness of this court's judgment. However, *Jew Sing* appears to us a much weaker case from the government's standpoint than that of the petitioner here. It appears that Jew Sing had resided continuously in the United States from 1921 until

1947, when he made a visit to China, returning to this country a few months later. He was refused admission and ordered deported, but was then paroled by the Service under bond to afford him an opportunity to petition for naturalization as an honorably discharged veteran of World War II. In the case now before us the petitioner had had no prior residence here. During her entire stay in this country she was enlarged only at the sufferance of the Immigration Service.

Considering all circumstances we are persuaded that the denial by the trial court of the writ of habeas corpus was not error, and its order is accordingly affirmed.

[File endorsement omitted]

[fol. 17] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14252

LENG MAY MA, Appellant,

v.

BRUCE G. BARBER, District Director, Immigration and Naturalization, Appellee.

JUDGMENT—Entered February 5, 1957

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

[fol. 18] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 19] SUPREME COURT OF THE UNITED STATES
No. 916, October Term, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—June 3, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Section 237, supra, nor "immediately deported," it is obvious that by statutory language that section is not applicable.

Section 243 of the Immigration and Nationality Act specifically provides for the deportation of any alien whether his removal be under the provisions of the Immigration and Nationality Act "*or any other Act.*" Deportation of an alien excluded by a Board of Special Inquiry convened pursuant to the provisions of Section 17 of the Immigration Act of 1917 (8 U.S.C. 153) is subject to removal and deportation at this date under the provisions of Section 243, supra.

The Court below by its opinion concludes that certain aliens deportable under Section 243(a) of the Immigration and Nationality Act are not eligible for relief under the provisions of subparagraph (h) of the same section of law.

4. The Court of Appeals for the District of Columbia in *Lim Fong, et al., v. Brownell,* 215 F.2d 683, 684, decided July 22, 1954, in part held:

> "* * * here deportability is conceded and the only attack is upon the Attorney General's decision that appellants should be deported to Continental China, * * *"
>
> "* * * the question is whether the complaint states a case for a preliminary injunction. It alleges in substance that appellee, acting through his agents, arbitrarily and contrary to law has determined that claims of persecution made by Chinese aliens and filed pursuant to Section 243 (h) of the Immigration and Nationality Act shall not be honored, and that in so determining he